69-1700-4594-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Lawrence D. Seymour,
Charging Party,
vs.

Minnesota Board of Water and Soil Resources,
Respondent.

ORDER QN MOTION FOR SUMMARY JUDGMFNT

The above-entitled matter is before the undersigned Administrative Law Judge on Respondent's Motion to Dismiss and Motion for Summary Judgment.

Donald Paquette, Attorney at Law, 2000 Aquila Avenue North, Golden Valley, Minnesota 55427 represents the Charging Party, Lawrence D. Seymour (Seymour). Steven M. Gunn, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103 represents the Respondent, Minnesota Board of Water and Soil Resources (BWSR), in this matter. The record closed on these motions on May 17, 1990, upon receipt of the final submission from the parties.

Based on the record herein, the Administrative Law Judge makes the following:

QRDER

1. The Respondent's Motion for Dismissal is DENIED.

2. The Respondent's Motion for Summary Judgment is GRANTED as to the 1987 claim and in all other respects DENIED.

3. The hearing in this matter will be held June 14 and 15, 1990, commencing at 9:30 a.m. at the Office of Administrative Hearings.

4. The parties may proceed with normal discovery.

Dated: May 21 1990.

STEVE MIHALCHICK
Administrative Law Judge

MEMORANDUM

The Minnesota Human Rights Act, Minn. Stat. Ch. 363 (the Act), prohibits discrimination in hiring on the basis of age. Minn. Stat. 363.06, subd. 1(2)(a) (1989). "Age" is defined as protecting any individual over the age of majority. Minn. Stat. 363.01, subd. 28. The Act requires any discrimination claim to be brought within one year of the occurrence of the practice. Minn. Stat. 363.06, subd. 3. In this case, Seymour filed a charge with the Commissioner of Human Rights (the Commissioner) on August 25, 1989, alleging discrimination in employment on the basis of age by the BWSR. The Commissioner referred the charge for hearing under Minn. Stat. 363.071, subd. l(a) at the request of the Charging Party since the Commissioner did not investigate the charge within 180 days. Since the order for hearing was not sought by the Commissioner, no Complaint was filed in this matter. A prehearing conference was held in this matter on April 19, 1990, at which time limited discovery was permitted with respect to the qualifications of those persons granted interviews for the position of Assistant Director of BWSR.

A Motion to Dismiss must be decided upon the pleadings. Due to the nature of these proceedings, no Complaint or Answer has been filed in this matter. However, the charge, motion documents, memoranda, and accompanying affidavits make clear both the bases of the dispute and the underlying allegations in this case. Where matters outside the pleadings are considered, a motion to dismiss for failure to state a claim is treated as a motion for summary judgment. Minn.R.Civ.Proc. 12.02. Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter , 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp, 378 N.W.2d 63, 66 (Minn.App. 1985). The evidence must be viewed in a light most favorable to the non-moving party. Sauter, 70 N.W.2d at 353. The party defending the motion must present "specific facts showing there is a genuine issue for trial." Minn.R.Civ.Proc. 56.05; age alga, Rademacher-v. FMC-Corp., 431 N.W.2d 879, 881 (Minn.App. 1988).

Two hiring decisions are cited in Seymour's charge against BWSR. The first relates to the hiring of an Executive Director for BWSR. Seymour applied for that position in 1987 and was "found unqualified." Affidavit of Lawrence D. Seymour, at 1. The position was awarded to James R. Birkholz in April, 1988.

The second hiring decision cited in the charge is the selection of an Assistant Director for BWSR. That position was announced and applications accepted during the summer of 1988. Seymour (and twenty-one other applicants) scored 100 on a competitive examination for the position. Only those who scored 100 were considered for the position. Of those twenty-two, interviews were granted to eight. Seymour was not granted an interview. The Assistant Director position was filled by Patricia Bloomgren on November 4, 1988. Affidavit of Patricia Bloomgren, at 1. At the time she accepted the position, Bloomgren was forty-one years and six months of age.

Birkholz avers that he was not aware of the ages of any of the applicants throughout the hiring process. According to an estimate made for the purposes of this Motion by Birkholz, the ages of the applicants interviewed are mid-thirties (four applicants), forties (one applicant), Eorty-one (one applicant), fifty-eight (one applicant), and unknown (one applicant). At the time the position was filled, Seymour was forty-six. The selection of those to be interviewed was made by a BWSR member, Bill Cofell, in consultation with Birkholz. Cofell is a retired professor and approximately seventy years old. There is no evidence as to how these selections were made.

BWSR has asserted two reasons for not interviewing Seymour for the Assistant Director position. First, his name was not included in the .short list" compiled by Cofell and Birkholz. Second, Birkholz averred that he knows Seymour personally and observed both Seymour and the functioning of Seymour's Division within the Department of Natural Resources (DNR). Birkholz asserts that, in his opinion, he and Seymour would not work well together and that the employees under Seymour's management in the other agency could have functioned more smoothly.

Seymour has responded to these assertions by placing his qualifications, accomplishments, and personnel data (including performance reviews) into the record. Seymour asserts that these qualifications and accomplishments are unequalled among the other applicants. Further, Seymour questions Birkholz's opportunity to observe Seymour or his Division.

Executive Director Position.

A potential claim exists in the allegations made in the initial charge with respect to the awarding of the Executive Director position with BWSR. However, the charge in this matter was filed more than one year after that alleged discriminatory occurrance. The period of limitation set by the Act may be extended when the violation is deemed to be "continuing." Sigurdson v. Isanti County 448 N.W.2d 62, 67 (Minn. 1989); United Airlines Inc. v. Evans 97 S.Ct. 1885, 1889 (1977); brotherhood of ry. and S.S. clerks Freight Handlers Exp. and Station Emp., Lodge; 364 v. State by Balfour. 229 N.W.2d 3 (Minn. 1975). The alleged discriminatory occurrence, the hiring of someone else as the Executive Director, was concluded in April, 1988. The violation did not continue beyond that point. The charge was filed on August 25, 1989. Any claim with respect to the hiring of the Executive Director is not timely and cannot be considered now.

The Assistant Director position was filled on November 4, 1988. This occurrence is within one year of the filing of the charge in this matter. Seymour's claim relating to the hiring of the Assistant Director is timely under the Act.

Prima Facie Case.

Seymour has not presented any direct evidence of discriminatory motive in the hiring practices of BWSR. When indirect evidence is used

to prove unlawful discrimination, the three-part test established by McDonnell Douglas Corp. v. Green 93 S.Ct. 1817 (1973) is used to determine if the plaintiff has established case of discrimination. This test has been adopted for cases brought under the Minnesota Human Rights Act. Danz v. Jones, 263 N.W.2d 395, 398-99 (Minn. 1978). The first part of the McDonnell-Douglas test is for the plaintiff to establish a prima Cecil case, Anderson v. Hunter Keith Marshall & Co. 417 N.W.2d 619, 623 (Minn. 1988). As applied in hiring situations, a prima facie case of discrimination contains the following elements:

(1) The applicant belongs to a protected class.

(2) The applicant was qualified for the position sought.

(3) The applicant was not hired despite those qualifications.

(4) The position was ultimately filled by a person outside the protected class.

See, Hubbard v. United Press International Inc. 330 N.W.2d 428, 441-42 (Minn. 1983); Khalifa v. State, 397 N.W.2d 383, 387 (Minn.App. 1986); Becker v. Wenco Foods/Wendys, 638 F.Supp. 650, 652 (S.D.N.Y. 1986). The fourth element changes to meet the changing situations presented in varying employment situations. Khalifa, at 387.

Seymour was forty-six years old at the time interviews were granted for the Assistant Director position. This puts him over the age of majority and within the protected class for age established by the Human Rights Act. As to the applicant being qualified for the position, Seymour's test score was 100 of a possible 100. Further, he has submitted additional evidence of his qualifications which, taken in its most favorable light, shows that Seymour is highly qualified for the position. Seymour was not hired for the position, so the third element has also been established.

The person ultimately hired for the position was five years younger than Seymour. Under the Federal Age Discrimination in Employment Act, 29 U.S.C. 621 et seg. (ADEA), the protected class for age begins at age 40, as opposed to the Human Rights Act, which protects everyone over the age of majority. However, cases brought under the ADEA have held that employment decisions regarding replacement by other workers within the protected class can fulfill the non-member of the protected class requirement. Moore v. Sears Roebuck and Co. 464 F.Supp. 357 (N.D.Ga. 1979)(seven year difference in ages). The Administrative Law Judge concludes that because the Human Rights Act is intended to prohibit consideration of age in employment decisions, a "non-member" of the protected class would include anyone significantly younger (or older, in the proper case) than the charging party. The difference in ages between Seymour and Bloomgren has significance because the forties are when people become -middle-aged- and the difference between forty-one and forty-six could be considered as the difference between someone -on the way up" and someone "over the hill" based strictly an aqe-based stereotypes. At some point, the difference in ages between an applicant

and the person hired may become de minimis. That is not the case here. The five year age difference in this case is sufficient to meet the prima facie case element of a nonmember of the protected class obtaining the job.

Applying these factors to the present case, Seymour has met his burden to demonstrate a prima facie case of age discrimination.

Legitimate Reason for Choice

Once the applicant has met the first part of the test, a presumption is created that the employer unlawfully discriminated. Schlemmer v. Farmers Union Central Exchange Inc. 397 N.W.2d 903, 907 (Minn.App. 1986)(citing Hubbard, at 441-42 n. 12). However, in the second part of the McDonnell__Douglas test, the employer has the opportunity to rebut that presumption by articulating a -legitimate, nondiscriminatory reason for the employment action." Schlemmer, at 907 (quoting Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089, 1094 (1981)); Anderson, 417 N.W.2d, at 623. If a valid reason is shown for the employer's action, the third part of the McDonnell Douglas test shifts the burden back to the applicant to show that the reason asserted is, in fact, pretextual. Anderson, 417 N.W.2d, at 623-24; Ridler v. Olivia Public Schhhhool System No. 623, 432 N.W.2d 777, 780 (Minn.App. 1988); Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089, 1094 (1981). This may be done by showing either that the employer was actually motivated by discrimination or by discrediting the employer's explanation. Schlemmer, at 907. Ultimately, the applicant must show that "age was a factor which made a difference in the employment decision." Jacobson v. Pitman-Moore Inc,, 573 F.Supp. 565, 570 (D.Minn. 1983)(citing Tribble v. Westinghouse Elec. Corp,, 669 F.2d 1193, 1196 (8th Cir. 1982), cert_ denied, 103 S.Ct. 1767 (1983)).

BWSR has asserted two reasons for not interviewing Seymour. The first is that his name did not appear on the list of interviewees culled from the 22 persons who scored 100 on the test for the position. Asserting this fact as a reason for not interviewing Seymour begs the question of legitimacy. No standards have been placed in the record regarding guidance for the persons performing this initial screening. Screening techniques may form the basis of a discrimination claim. Kastner v. I.S.D. No. 625 , 284 N.W2d 362, 366 (Minn. 1979); Nobler v. Beth Israel Medical Center 702 F.Supp. 1023, 1026 (S.D.N.Y. 1988). Without more evidence relating to the methods used at the screening stage of the employment process, this does not constitute a legitimate reason in response to Seymour's prima facie case.

The second reason asserted by BWSR for not interviewing Seymour is that the Executive Director, Birkholz, knew Seymour, observed Seymour, observed the functioning of the employees under his direction, and believed that those employees could have functioned more smoothly. Birkholz alleges that Seymour's "management style" was incompatible with that of Birkholz. Since the Assistant Director must work closely with the Executive Director of BWSR an incompatible management style could constitute a legitimate reason for net selecting an applicant. See, Kastner, 284 N.W.2d, at 365. However, the assertion that employees under

Seymour's direction could have functioned more smoothly is actually directed to Seymour's qualifications for the position.

Pretext

Where, as here, the applicant has established a prima facie case of age discrimination in hiring and the employer has asserted a legitimate reason for its action, the burden shifts to the applicant to show that the asserted reason is pretextual. Schlemmer, at 907. On a motion for summary judgment, the applicant must show "a triable issue as to pretext." Nobler, 702 F.Supp. at 1028. This burden is met by raising an inference that "age made a difference." Nobler, 702 F.Supp. at 1028 (citing Hagelthorn v. Kennecott Corp. 710 F.2d 76, 82 (2nd Cir . 1983) Jacobson 573 F.Supp., at 570; Tribble, 669 F.2d, at 1196.

Seymour has alleged a "history of age discrimination" at BWSR and its predecessor, the Soil and Water Conservation Board (SWCB). He alleges that the 50 year old director of the SWCB was replaced by a 36 year old director, Ron Nargang. Nargang (who, four years later, replaced Seymour as Director of the Division of Waters at the Department of Natural Resources) allegedly said to Seymour "managers should be young and hungry- and that Seymour reminded Nargang of his predecessor at the SWCB. Nargang is not connected with BWSR and no substantial facts have been alleged to indicate that Nargang's actions or opinions in any way influenced Birkholz's decision not to interview or hire Seymour as his assistant. Thus, this alleged "history" of discrimination does not show pretext.

Seymour has also alleged (in his initial charge filed with the Commissioner) that the hiring of a thirty-three year old Executive Director (Birkholz) for BWSR shows a history of discrimination based on age. None of the procedures for making that selection have been introduced into the record. Without that information, the mere fact of hiring a younger person as Executive Director does not create an inference of age discrimination.

The credibility of BWSR's assertion that a "conflicting management style" is the reason for not interviewing Seymour has been attacked. Seymour asserts that his employment record has been superlative and that any management problems would appear in his personnel file. Further, the basis for Birkholz's opinion of Seymour's management style is attacked. Seymour questions how Birkholz obtained his information.

Taken in the light most favorable to Seymour, the facts presented show that he is a very qualified applicant, with both knowledge and experience in the field to which the position relates. Seymour clearly did not receive an interview. Only one person interviewed was older than Seymour, and Seymour alleges that that person was a friend of Cofell's. The only legitimate reasons advanced by BWSR for not interviewing Seymour are that he was not a good manager and that Seymour's "management style" is incompatible with that of BSWR's Executive Director. Although Seymour's allegedly excellent qualifications do not mandate that he receive the position, they create a material issue of fact when the legitimate reason asserted for not interviewing the applicant is that the

applicant's prior responsibilities were not discharged adequately. With regard to the "management style" response, few facts could be asserted to respond to such an intangible factor, absent extensive discovery. Here, the facts of the case are relatively undeveloped and only limited discovery has been conducted. Seymour applied for a subordinate managerial position with BWSR. That action indicates that Seymour believed his management style would be compatible with both the Executive Director and BWSR. Thus, Seymour has raised material issues of fact as to whether the legitimate reasons asserted by BWSR are pretextual.

Conclusion.

BWSR's Motion to Dismiss must be denied since the motion was considered as a motion for summary judgment. Summary judgment must be granted in favor of BWSR on the issue of the hiring of the Executive Director since the charge was not timely filed with respect to that occurrence. Summary judgment must be denied with respect to the issue of the hiring of the Assistant Director because Seymour established a prima facie case of discrimination and, while BWSR has met its burden of showing legitimate reasons for its employment action, Seymour has raised triable issues of fact as to whether those reasons are mere pretext.

S.M.M.